IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 26TH MARCH 2007 / 5TH CHAITHRA 1929

SA.No. 379 of 1993()

AGAINST THE ORDER DATED 10/03/1993 IN O.S.342/85 OF MUNSIFF COURT, PATHANAMTHITTA IN AS.124/1989 of DISTRICT COURT, PATHANAMTHITTA

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APPELLANT/PLAINTIFF:

J.JOHNSON, LECTURER
ST. THOMAS COLLEGE
KOZHENCHERY.

BY ADV. SRI.K.P.VIJAYAN, P.K.ALEXANDER VAIDIAN,
SRI.BOBY MATHEW

RESPONDENT/DEFENDANT:

A.GEORGE, MANGATTU VEEDU
KOZHENCHERY MURI AND VILLAGE
KOZHENCHERY TALUK.

BY ADV. SRI.S.VENKITASUBRAMANIA AYYAR (SR),
SRI.GIRI.V.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26/3/2007 THE COURT ON 26/03/2007 DELIVERED THE FOLLOWING:

ORDER ON CMP NO. 888/1993 IN SA 379/1993

DISMISSED

26.3.2007 SD/- M.SASIDHARAN NAMBIAR, JUDGE

lgk

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 379 OF 1993

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DATED THIS THE 26th DAY OF MARCH, 2007

JUDGMENT

Plaintiff in O.S.342/1985 on the file of Munsiff Court, Pathanamthitta is the appellant. Defendant is the respondent. Appellant filed the suit seeking a decree for permanent prohibitory injunction. Under Ext.A3 sale deed dated 3.11.1977, appellant purchased the property and plaint schedule property is a portion of the property and the southern boundary of the property is the compound belonging to Theruvelil and a pathway having a width of 10 feet and the property to the south of the pathway belongs to the respondent and respondent is attempting to construct a compound wall enclosing the pathway to his property and he has no right to do so and therefore a decree for injunction is to be granted restraining respondent from constructing a compound wall enclosing the pathway or causing obstruction to the pathway.

2. Respondent filed a written statement contending that there is no pathway as alleged and the description of the plaint schedule property is not correct and as per the order of Land Tribunal a pathway was given through the plaint schedule

property to Mariyamma Thomas and there was a pathway on the south and east of plaint schedule property and that pathway is demarcated by wire fencing and the pathway to the house of Mariyamma Thomas is lying through western side of the western boundary Kayyala of Koyikkaparambil Purayidom and appellant is not entitled to the decree sought for.

3. Learned Munsiff framed the necessary issues. Evidence consists of PW1, Dws 1 to 6 and Exts.A1 to A3, B1 to B14 and C1 to C3; Relying on Exts.C1 to C3 and oral evidence of DW5, the Commissioner, learned Munsiff found that there is a pathway as claimed by the appellant. Relying on northern boundary of the property covered under Ext.A2, it was found that the way has been in existence from 1110 ME. Hence a decree was granted in favour of the appellant. Respondent challenged the decree and judgment before District Court, Thodupuzha in A.S.124 of 1989. Before first appellate court Ext.B15 the anterior title deed to Ext.A2 was produced along with Ext.B16 sale deed, with an application under Order XLI Rule 27 of Code of Civil Procedure. The learned District Judge finding that the documents are necessary to pronounce a better judgment, allowed the application and marked Exts.B15 and B16. The learned District Judge, relying on Ext.B15, found that the northern boundary is

not shown as pathway as is the case with Ext.A2. Finding that there is no evidence to prove that there was an existing pathway which was being used from time immemorial as claimed by the appellant, learned District Judge set aside the decree and dismissed the suit and allowed the appeal. It is challenged in the Second Appeal.

4. The appeal was admitted after formulating the following substantial questions of law:-

i)Whether a compromise arrived at in a suit between two owners of properties situated along a public pathway will affect the right of the public and other owners of the property along the said pathway, who are not parties to the said compromise, to use the pathway in question.

ii)Will the right of access over a public pathway of an owner of property lying on the side of it be extinguished when access to another pathway along another side of his property is also available.

Iii)Is there any restriction in law that the owner of a piece of land can have access to only one public pathway from his property and that the availability of another public pathway will extinguish his right over the other public pathway which he has been using.

5. Learned counsel appearing for appellant and respondent were heard. The argument of learned counsel appearing for appellant was that trial court has appreciated the evidence in the proper perspective and first appellate court was not justified in interfering with the decree and dismissing the suit.

6. Learned counsel appearing for respondent argued that the substantial question of law suggested in the appeal memorandum do not arise for consideration and there is no reason to interfere with the decree and judgment passed by the first appellate court.

7. On hearing the learned counsel appearing for the appellant and respondent, I do not find that the substantial question of law formulated in the appeal are not actually involved in the appeal. The suit is only one for injunction. What was contended by appellant was that the disputed pathway lies to the south of the property of the appellant to north of the property of respondent and it does not form part of the property of the respondent which lies to the south and that way has been in existence from time immemorial and is being used since then and therefore respondent is not entitled to encroach upon the pathway or enclose it by constructing a compound wall. Learned Munsiff granted a decree relying on the northern boundary

shown in Ext.A2. The learned District Judge relied on Ext.B15, the anterior title deed to Ext.A2 and held that existence of the pathway as the northern boundary is not shown therein.

8. The question whether a pathway has been in existence from time immemorial as claimed by the appellant and whether the appellant has a right over the same and if so, whether it forms part of the property of respondent. Apart from examining the Power of Attorney holder of the appellant, no other evidence was adduced to prove the existence of a pathway from time immemorial as contended in the plaint. As rightly found by the learned District Judge when existence of a pathway is not clear from the northern boundary of Ext.B15, the mentioning of a pathway as northern boundary in Ext.A2 by itself is not a ground to hold that a pathway has been in existence from time immemorial. As rightly pointed out by the learned counsel appearing for the respondent, if there was such a pathway in existence from time immemorial the southern boundary of the property covered under Ext.A3 the title deed of appellant would show the pathway as the southern boundary. Instead what is shown in Ext.A3 is Theruvelil Purayidom Vaka property and not the pathway. If a pathway as claimed by the appellant has been in existence at least when Ext.A3 sale deed was executed, then

existence of that pathway would have been mentioned as the way available to the property assigned under Ext.A3. The absence of any mention of such pathway fortifies the findings of the learned District Judge that existence of the pathway from time immemorial was not established. If that be so, appellant is not entitled to the decree sought for and the decree granted by the learned Munsiff was rightly set aside by the learned District Judge. I find no merit in the appeal. Appeal fails. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-